

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

	x	
IN RE PAYMENT CARD INTERCHANGE	:	MDL Docket No. 1720 (JG)(JO)
FEE AND MERCHANT DISCOUNT	:	
ANTITRUST LITIGATION	:	<b><u>ELECTRONICALLY FILED</u></b>
_____	:	
	:	PARTIES' JOINT CASE STATUS REPORT
This Document Relates To:	:	AND PROPOSED AGENDA FOR CASE
	:	MANAGEMENT CONFERENCE NO. 29
ALL ACTIONS	:	
_____	x	Date: September 17, 2009
		Time: 1:00 p.m.
		Judge: Honorable James Orenstein

Plaintiffs and Defendants submit this Joint Case Status Report and Proposed Agenda for Case Management Conference No. 30, scheduled for September 17, 2009. Where the parties' positions differ, Plaintiffs' and Defendants' positions are detailed separately.

**I. PENDING MOTIONS**

1. Motion to Dismiss the Second Consolidated Amended Class Action Complaint and to Strike Chase Paymentech Solutions, LLC. DE 1171-75.
2. Motion to Dismiss the First Amended Supplemental Class Action Complaint. DE 1179-81.
3. Motion to Dismiss the Second Supplemental Class Action Complaint. DE 1176-78.
4. Class Plaintiffs' Motion for Class Certification. DE 1165-67.
5. Plaintiffs' Motion to Compel the Production of Evidence that has been Withheld Under a Claim of Privilege. DE 1261.
6. Defendants' Motion to Exclude the Opinions of Dr. Gustavo Bamberger. DE 1267.
7. Plaintiffs' Motion to Compel Production of Document Claimed to be Privileged by MasterCard. DE 1294.

**II. PLAINTIFFS' DISCOVERY TO DEFENDANTS**

**A. Plaintiffs' Position**

In the last status report, the parties informed the Court that issues relating to supplementation of discovery relating to foreign judicial proceedings was largely resolved, with the exception of Plaintiffs' request to MasterCard for (i) its communications with the EC relating to its "conditional settlement" with the EC, whereby it agreed to lower its cross-border default

interchange fees in Europe pending the appeal of the EC's December 2007 decision; and (ii) the audio recording of the Commission's hearing in its investigation of MasterCard that resulted in the December 2007 decision.

With respect to the communications relating to the conditional settlement, the parties have reached agreement as to the scope of materials in this category that MasterCard will produce and are discussing whether a court order is necessary to allow MasterCard to preserve the confidentiality of the communications under European law and are discussing the contours of a stipulated order, in the event that such an order is necessary.

With respect to the oral hearing, MasterCard has provided to Class Plaintiffs' a letter from the Commission's Secretariat General setting forth the Commission's policies with respect to the discovery of materials related to Commission proceedings. The parties continue to discuss issues with respect to the recording of the oral hearing in light of the Commission's letter.

#### **B. Defendants' Position**

MasterCard agrees that the parties are continuing to discuss these issues and expects that the parties will be able to reach resolution promptly.

### **III. AMENDMENT OF MOTION FOR CLASS CERTIFICATION**

#### **A. Plaintiffs' Position**

After serving the class certification motion, Plaintiffs filed the Second Consolidated Amended Class Action Complaint, which added a claim that Visa and its member banks unlawfully fixed interchange fees for Visa's PIN debit transactions. Plaintiffs concurrently filed the Second Supplemental Class Action Complaint, which challenges Visa's initial public offering ("IPO"). Plaintiffs want to amend the class certification motion to include these new

claims. Plaintiffs believe that no additional briefing or other submissions should be necessary, as the existing submissions collectively address the class issues raised by those claims.

Plaintiffs proposed all of the above to Visa on August 26. It was not until this evening that Defendants raised any of the purported concerns below regarding that proposal. The resulting time restraints preclude Plaintiffs from detailing why those concerns should not be of concern to the Court. In any event, Plaintiffs have reason to expect that the parties will be able to resolve this issue without the Court's intervention.

#### **B. Defendants' Position**

Plaintiffs recently informed Defendants of their desire to now amend their pending class certification motion. Defendants have not been provided with the draft papers Plaintiffs propose to submit in this regard, and, in the absence of the proposed submissions and time adequately to consider the matter have not yet formulated a position. In addition, Defendants are concerned about the timing of this proposed amendment given the comprehensive briefing and discovery on class certification issues that has already occurred. In that regard, we note also that (1) in a May 8, 2008 filing, Plaintiffs stated to the Court and the parties that they would move for certification of classes with regard to the Visa PIN debit and Visa IPO claims after the filing of amended complaints (Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, p. 5, nn. 6 and 7); (2) in January 2009 Plaintiffs filed their amended complaints but made no such motion; and (3) nearly three months ago Defendants observed as follows in Defendants' Sur-Reply Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification, at p. 5: "Plaintiffs have not moved for class certification with respect to their PIN debit claims, despite their earlier promise to do so." Defendants intend to discuss this matter with Plaintiffs further in an effort to obtain greater clarity as to their position.

DATED: September 10, 2009

Respectfully submitted,

/s/ Bart D. Cohen

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*On behalf of Class Plaintiffs and on behalf of all  
parties for this Status Report*